***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 19,208

DAVID ENGEL,

*Appellant*

622

HELEN BERKOWICH, et al.,

*Appellees*

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*Appeal From the United States District Court*
*for the District of Columbia*

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## QUESTIONS PRESENTED

1. Whether the trial Court committed reversible error (a) by declining to examine the proffered documents on which the case turned, (b) by relying instead on argument by Plaintiff's counsel, and (c) by rendering a judgment which is without substantial support in the record, and which is in fact contradicted by the relevant documentary evidence.

2. Whether the trial Court committed reversible error by accelerating payment of a debt established by stipulation, thereby giving the Plaintiff far more than the parties had stipulated and far more even than the Plaintiff had requested.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*Appeal From the United States District Court*
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## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction of this case under what is now 11 D.C.C. 521(a)(1). This Court has jurisdiction under 11 D.C.C. 321(a). The facts of record supporting jurisdiction appear in the Pretrial Proceedings (JA 1-8).

## STATEMENT OF THE CASE [1]

The parties entered into a stipulation in October 1964, that included the following relevant provisions:

(1) The Defendant was to pay the Plaintiff $14,500 in installments over a period of about twelve years. No payments were to be made for 21 months, and thereafter the Defendant was to pay $120.00 per month for 121 months. (Stipulation, JA 9.)

(2) As collateral for his note for the $14,500, the Defendant was to put up certain shares of stock (40% of the outstanding capital stock in Berky's Carry Out Foods, Inc.). These shares were to be "endorsed in blank and deposited with the Union Trust Company in escrow." (Stipulation, JA 10).

(3) The Defendant was given the power to sell Berky's Carry Out corporation, with 40% of the purchase price to be applied to payment of the note. (Stipulation, JA 11) No express mention appears in the Stipulation regarding release of the stock from excrow in case of a sale of the corporation, but such release was of course essential to, and implicit in, the power to sell.

During the month following the stipulation, the parties exchanged several drafts of notes. The draft on which the Plaintiff chose to stand (Exh. 1, Motion for Rehearing and Reconsideration of Judgment Entered; JA 27) was inconsistent with the Stipulation in two respects: first, it provided that the shares of stock (in negotiable form) be deposited with

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[1] This is an appeal from an order on a motion to enforce a stipulation. The facts relating to the original dispute, therefore, are not here material, except insofar as they reflect a considerable amount of mistrust and ill will between the parties, extending over several years. (See Pretrial Proceedings, JA 1-8).

the Plaintiff, rather than "with the Union Trust Company in escrow," as agreed in the Stipulation;[2] second, it failed to provide for release of the stock, as required by the power to sell the corporation in accordance with the Stipulation.

The Defendant had submitted to the Plaintiff a signed note that was otherwise virtually identical to Plaintiff's, but that provided for the stock to be in escrow, subject to necessary release in case of a sale. (Motion for Rehearing and Reconsideration of Judgment, Exh. 2; JA 29) Despite receipt of this note signed by the Defendant, the Plaintiff moved for enforcement of the Stipulation, as if the Defendant had not complied.

At the hearing on the motion, the judge declined to examine the notes and compare them with the Stipulation (JA 23). Instead, he relied upon argument by counsel for Plaintiff as to whether the Defendant's note complied with the Stipulation (JA 23-24).

In ordering a judgment for the Plaintiff, the trial court gave the Plaintiff substantially more than the Stipulation allows and more than the Plaintiff had requested. The Stipulation provides for $14,500 to be paid over twelve years. Plaintiff asked for enforcement of the Stipulation.[3] Instead, the trial court ordered immediate payment of the entire

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[2] Counsel for Plaintiff seems to have conceded error in this regard, by asking the trial court to provide for an escrow arrangement (JA 21). Nevertheless, the trial court appears to have found for Plaintiff on this issue.

[3] "THE COURT: What are you asking the Court, specifically, to do?

"MR. FRIEDMAN [for Plaintiff]: I would ask the Court to direct the signing of this collateral note . . . If they refuse . . . we ask the Court to enter a judgment for that $14,500 and allow us to have execution." (JA 21.) (Emphasis added.)

The trial judge never gave the Defendant an opportunity to sign or to refuse to sign the note. (See Defendant's Affidavit accompanying Motion for Rehearing and Reconsideration of Judgment entered; (JA 27.)

principal amount.[4] Thus, the Defendant was unnecessarily and unfairly deprived of the use of his money -- *i.e.*, the legal interest on $14,500 -- to the extent that the Stipulation entitled him to keep it over a period of 12 years. This penalty amounts to $5,794.00.[5]

## STATEMENT OF POINTS

1. The trial court committed reversible error (a) by declining to examine the proffered documents on which the case turned, (b) by relying instead on argument by Plaintiff's counsel, and (c) by rendering a judgment which is without substantial support in the record, and which is in fact, contradicted by the relevant documentary evidence.

2. The trial court committed reversible error by accelerating payment of a debt established by Stipulation, thereby giving the Plaintiff far more than the parties had stipulated and far more even than the Plaintiff had requested.

## SUMMARY OF ARGUMENT

The trial court committed two serious errors in this case, either of which requires reversal.

First, the judge below found, contrary to documentary fact, that the Defendant had failed to comply with the parties' Stipulation. This issue turned upon the terms of two notes, each submitted by one party to the other. The trial judge declined to examine the notes and compare them with the terms of the Stipulation. Instead, he relied upon argument of

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[4] The trial court also allowed Plaintiff's attorney's fees (JA 19), although the Stipulation provided for none, and the Plaintiff's motion requested none. (See (JA 24.)

[5] Calculated at 6%, the interest lost for the first twenty months is $1,450. That lost for each succeeding year is: (1st year) $823.20; (2nd year) $736,80; (3rd year) $650.40; (4th year) $564.00; (5th year) $477.60; (6th year) $391.20; (7th year) $304.80; (8th year) $218.40; (9th year) $132.00; (10th year) $45.60.

Plaintiff's counsel. As a result, the judgment of the court below is without any substantial support in the record, and is contradicted by the documents themselves.

Second, the Court below erred in granting damages to the Plaintiff far in excess of the parties' Stipulation and, indeed, far in excess of what the Plaintiff's counsel specifically requested of the court. The Plaintiff wanted — and is entitled to — no more than enforcement of the Stipulation. This provided for $14,500 to be paid over a period of about 12 years. The trial court, without justification, accelerated this debt to immediate payment of the entire amount, thereby penalizing the Defendant needlessly and arbitrarily, to the extent of $5,794.00.

## ARGUMENT

### I.

### The Record Is Devoid of Any Substantial Support for the Trial Court's Finding That the Note Tendered by the Defendant Did Not Comply With the Stipulation

A simply comparison of the Stipulation with the notes at issue discloses that the Defendant's note complies in all essential respects, while the Plaintiff's note is seriously deficient.[6] The error on the part of the trial judge results from his declining to examine the notes when proffered (see JA 23). Instead, he relied upon argument of Plaintiff's counsel (JA 23-24). This was error. The trial court is "bound to exercise its independent judgment without surrendering to that of counsel." *Laughlin v. Berens*, 73 App. D.C. 136, 139 (1940). The trier of fact "has no right to assume the truth of any material fact, without some

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[6] Since this fact appears to be beyond serious dispute, Appellant rests on the Statement of the Case, *supra*, pp. 2-3.

evidence legally sufficient to establish it." *Parks v. Ross*, 52 U.S. 362, 373, 11 How. 362 (1851).

Even if the trial court had carefully scrutinized the evidence, this Court, we submit, should reverse. "The right to look into the evidence to test its sufficiency to support a judgment is always within the jurisdiction of an appellate court." *Moy Jik v. United States*, 47 App. D.C. 498 (1918). Even on an issue indisputably involving a question of fact, "the holding by a trial court on that question may be reversed if there is no substantial evidence in the record to support it." *Dawson v. Norris*, 108 A.2d 538 (D.C. Mun. App. 1954). This is so not only when the evidence is "all one way," as in the present case. See *George v. Capitol Traction Co.*, 54 App. D.C. 144, 147, 295 F. 965 (1924). It is equally so even when there is evidence to support the trial court's finding, if "the reviewing court on the entire evidence is left with a definite conviction that a mistake has been committed." *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 8 (1954). Indeed, when, as here, the evidence is documentary, an appellate court may disregard the finding of a judge sitting without a jury. *Dollar v. Land*, 87 App. D.C. 214, 217-18, 184 F.2d 245 (1950).

The trial judge found that the note tendered by the Defendant did not comply with the Stipulation. Since this finding is without any substantial support in the record, and is contradicted by documentary evidence, the judgment should be reversed.

## II.

**The Court Below Erred by Ordering Immediate Cash Payment of the Entire Principal Amount of a Debt on Which 121 Monthly Installment Payments Were Not Due To Commence Until 20 Months Thereafter.**

The Stipulation called for payments over a period of about 12 years. The difference between $14,500 cash, and the same sum on the terms of the Stipulation, is $5,794 (see n. 5, *supra*).

The trial court had no power to enter an order in excess of the Stipulation. "The decree in this case was largely in excess of the stipulation and while it is affirmed upon its merits, it must be modified in regard to the amount of damages recoverable from the stipulators." *The Steamer Webb,* 81 U.S. 406, 418, 14 Wall. 406 (1871).

Indeed, the Plaintiff did not even request such an exhorbitant recovery. In response to a question by the court, counsel for Plaintiff specifically asked for enforcement of the Stipulation, suggesting judgment for the principal amount only in the event that the Defendant should refuse to obey an order of enforcement. (See n. 3, *supra.*) 'It is fundamental that . . . a man may not recover in damages an amount greater than that which he pleads will compensate him for his injuries." *Kerry v. Pacific Marine Co.,* 121 Cal. 564, 54 P. 89, 92, *mod.*, 54 P. 262 (1898) and *Edwards v. Lang,* 18 Cal. Rptr. 60, 65-66 (1961). [7]

When a trial judge miscalculates interest by using too early a date, the judgment will be reduced on appeal. *Gardner v. Freystown Mutual*

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[7] As might be expected, this is not an issue presented often on appeal. In the ordinary case of a judgment in excess of the Plaintiff's demand, Plaintiffs have typically seen fit to give the Defendant a voluntary remittitur. Even then, some appellant courts have considered reversal for a new trial to be called for. See 65 A.L.R.2d 1331, Verdict in Excess of Amount Demanded as Requiring New Trial Notwithstanding Voluntary Remittitur.

*Fire Ins. Co.*, 350 Pa. 1, 37 A.2d 535 (1944). The case is all the more compelling when, as here, the trial judge has erred by accelerating payment of the principal far in advance of the time agreed upon by the parties in their Stipulation.

## CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the judgment of the District Court should be reversed.

Respectfully submitted,

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# JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Benjamin Berkowich, et al.

David Engel, et al

Civil Action No. 2189-61

October 17, 1963

## PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Action for declaratory judgment and to recover balance due under promissory notes and money loaned; counterclaim for interference with contract rights and breach of fiduciary relationship as officer of corporation.

UNDISPUTED FACTS:

Prior to November 1954, plaintiff Helen Berkowich and Benjamin Berkowich, now deceased, her husband, formerly a plaintiff herein, were the sold owners of Berky's, Inc., a District of Columbia corporation, which owned and operated a restaurant located at 1236-42 South Capitol Street, in the District of Columbia. In November 1954, all of the assets of said business were sold to Defendants David and Esther Engel, who subsequently incorporated the business as Berky's Carry-out Foods, Inc., a District of Columbia corporation. In 1959, Benjamin Berkowich, David Engel and Norman Robert Engel formed a Maryland corporation known as Berky's Drive-In, Inc. for the purpose of acquiring certain real estate located at Peace Cross in Bladensburg, Maryland, and to erect a drive-in restaurant thereon. All of said parties invested certain sums of money in the business.

The Corporation, Berky's Drive-In, Inc., executed a promissory note in the amount of $10,000, with interest at 6%, dated July 2, 1959, payable on demand to the order of Benjamin Berkowich, and a further

promissory note in the amount of $10,000, with interest at 6%, dated January 7, 1960, payable on demand to the order of Benjamin Berkowich.

On or about December 9, 1960, Berky's Drive-In, Inc. obtained a loan from National Savings & Trust Co., for which the corporation gave a promissory note signed by the corporation and endorsed by David and Norman Engel and Benjamin Berkowich personally.

Under date of January 7, 1960, Defendant David Engel executed a promissory note in the amount of $10,000, with interest at 6%, payable to the order of Helen Berkowich on or before ten years from date.

Berky's Drive-In, Inc. is no longer in business.

Berky's Carry-Out Foods, Inc., is still doing business at 1236 South Capitol Street, in the District of Columbia.

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PLAINTIFF Helen Berkowich, individually, and as executrix for her late husband, Benjamin Berkowich, former plaintiff herein, asserts that in 1959, she and her husband were induced by the individual defendants, David, Esther and Norman Engel, to invest $5,000 in the Maryland drive-in restaurant corporation to be formed, upon the representation that David and Esther Engel would invest $5,000 and that Defendant Norman Engel would also invest $5,000 for the purpose of acquiring the Maryland real estate; that Defendants Engel represented they would then obtain a 90% loan on the real estate and improvement, which would thereafter be operated for the benefit of Plaintiffs and the individual Defendants; that Defendants further represented to Plaintiffs that the total investment by Plaintiffs would be not more than $5,000;

That in reliance upon said representations by Defendants, Plaintiffs invested $5,000, the real estate was acquired, Berky's Drive-In, Inc. was incorporated and shares of stock were distributed as agreed;

That during the process of construction of improvements thereon for the operation of the restaurant, Defendant Engel induced Plaintiff to advance an additional $20,000 in cash as a temporary measure to help in the initial stages of the project, upon the representation that this amount would be reimbursed to Plaintiff out of a permanent loan and financing to be obtained; that as evidence of said loan, the corporation executed the two notes in the amount of $10,000, payable to Benjamin Berkowich, dated July 2, 1959 and January 7, 1960, respectively;

That thereafter upon the same representation, Plaintiff Helen Berkowich was induced to loan an additional $2,000 to the corporation, evidenced by a check of American Savings & Loan Association dated December 7, 1960;

That on December 9, 1960, Benjamin Berkowich further obligated himself personally as endorser of a note of Berky's Drive-In, Inc., in the amount of $6600, payable to National Savings & Trust Co., which was obtained by individual Defendants for operating and other expenses of the business; that said note was supposed to be paid by the corporation out of income.

Plaintiff asserts that the representations made by Defendant Engel were false in that:

(1) Defendant did not obtain the 90% loan on the real estate and improvements

(2) The total investment by Plaintiffs was not limited to $5,000

(3) The advancements by Plaintiffs to the corporation were not repaid out of permanent financing or from any other source;

That said representations were made for the purpose of inducing Plaintiffs to advance these funds, after which Defendant Engel intended to assume control over the business venture and deprive Plaintiffs of any interest therein.

Plaintiff Helen Berkowich further asserts that on or about January 7, 1960, Defendant David Engel induced her to advance to him individually the sum of $10,000, which sum said Defendant represented would be repaid upon demand and would be secured by a chattel deed of trust on all the assets of the business located at 1236 South Capitol Street; that said representations were false in that (1) David Engel executed and delivered to Plaintiff Helen Berkowich a promissory note payable on or before ten years from said date if this not be a demand note as now contended by Defendant David Engel; (2) said note was not secured by a chattel deed of trust and subsequent to execution of said note all of the assets of the business at 1236 South Capitol Street were conveyed by David and Esther Engel to a new District of Columbia corporation, Berky's Carry-Out, Inc.

Plaintiff asserts that prior to organizing the D.C. corporation, Defendants David and Esther Engel requested permission of Plaintiff Helen Berkowich and her late husband to form such a corporation for the purpose of more conveniently conducting said business; that upon such representations, Plaintiff acquiesced in formation of said corporation; plaintiff asserts that Defendants David and Esther Engel actually formed a corporation for the purpose of defrauding Plaintiff and her late husband by conveyance of all the assets of said business to the corporation.

Plaintiff asserts that after the restaurant project in Maryland was completed and the business began to function, she and her husband demanded the return of their funds which had been temporarily advanced as above described; that individual Defendants operated said business as their own and failed and refused to make any repayment or accounting to Plaintiff and her late husband; that said business has failed, the property has been sold under foreclosure proceedings since this action was filed, and Plaintiffs realized nothing therefrom.

Plaintiff further asserts that Defendant David Engel has made no payments to her on account of his note or interest of January 7, 1960, which he denies is a demand note.

SPECIAL DAMAGES:

| | |
|---|---|
| Original investment in Maryland business | $ 5,000.00 |
| July 2, 1959 loan evidenced by note payable to Benjamin Berkowich | 10,000.00 |
| January 7, 1960 loan evidenced by note payable to Benjamin Berkowich | 10,000.00 |
| Payments by Benjamin Berkowich, as endorser, on National Savings & Trust note | 1,000.00 |
| Payment by Helen Berkowich on account of National Savings & Trust note (estimated) | 500.00 |
| Loan to Defendant David Engel by Plaintiff Helen Berkowich 1/7/60 (note) | 10,000.00 |
| Interest on said note and notes of 7/2/59 and 1/7/60 at 6% | ? |

Plaintiff asks judgment against each of the Defendants in the amount of $36,500.00 plus interest at 6% on $10,000 from July 2, 1959, and on $10,000.00 additional from January 7, 1960, and on a further $10,000.00 from January 7, 1960, as compensatory damages and punitive damages against each of the Defendants in the sum of $25,000.00.

DEFENDANTS deny that Plaintiff is entitled to any relief against them. Defendants deny making any false representations to Plaintiff or her deceased husband, deny any fraudulent representations to either of them, deny that they are indebted to Plaintiff in any amount.

Defendant David Engel admits execution of the note dated January 7, 1960 payable to Plaintiff Helen Berkowich, but asserts that it is not yet due.

COUNTERCLAIM: (Individual Defendants David Engel and Norman Robert Engel vs. Plaintiff Helen Berkowich individually and as Executrix of Benjamin Berkowich)

Individual Defendants counterclaim against Plaintiff individually and as Executrix for Benjamin Berkowich, for:

(1) Deliberate interference in the business affairs of the individual Defendants through Plaintiff's interference with the affairs of Berky's Drive-In, Inc.

(2) Loss of the individual Defendant's good credit rating

(3) Interference with said Defendant's business contacts

(4) Breach of Plaintiff Benjamin Berkowich's fiduciary relation as officer and director of Berky's Drive-In, Inc.

As to all of said claims, Defendants assert that they had arranged in the summer of 1961, for a loan to David Engel in the amount of $35,000.00, to be made by Dr. Louis Feinstein on behalf of his daughter, Phyllis Feinstein Shur, proceeds of said loan to be used for the purposes of Berky's Drive-In, Inc.; that a definite commitment for said loan had been made to one Charles Sherman, who was handling the arrangements for said loan, and definite terms of the loan had been agreed upon; that Plaintiffs were aware of said proposed loan, but in an attempt to put pressure upon the individual Defendants, Plaintiffs threatened a law suit against the corporation and the individual Defendants unless Plaintiffs' demands were acceded to; that Plaintiffs instituted this suit with the intent to injure the individual Defendants and to interfere with said loan agreement; that as a result, the loan commitment was withdrawn, the Maryland business was unable to continue in operation, that the business was foreclosed and went out of business, and the individual Defendants suffered monetary damages and their credit reputations were damaged.

Defendants assert that from the time of the organization of Berky's Drive-In, Inc. and including the time that this suit was

instituted by Plaintiffs, Benjamin Berkowich was an officer of said corporation; that he was aware of the financial condition of said business; that as a result of said knowledge and with intent to injure the individual Defendants, said Benjamin Berkowich breached the fiduciary relationship between him and Defendants, officers and stockholders in said corporation, by the bringing of this action, deliberately causing serious financial damage to the individual Defendants and damage to their credit rating and standing in the community.

Counter-claimants assert that David Engel lost his entire investment in Berky's Drive-In, Inc. in the amount of $26,500, and Norman Robert Engel lost his entire investment in Berky's Drive-In, Inc., in the amount of $18,480 and was forced into bankruptcy, all as a result of the wrongful acts of Plaintiffs.

Each of the counter-claimants ask judgment against Plaintiffs for $50,000 compensatory damages and $50,000 punitive damages.

ANSWER TO COUNTERCLAIM:

Plaintiff individually and as executrix of Benjamin Berkowich states that the counterclaim does not state a cause of action upon which relief can be granted and denies the allegations thereof.

Plaintiff denies that Berky's Drive-In, Inc. was put out of business by any act of her or her late husband, denies that this suit was instituted for any wrongful purpose, and asserts that she and her late husband were damaged by the failure of Berky's Drive-In, Inc. to a greater extent than were counter-claimants.

STIPULATIONS:

Facts under UNDISPUTED FACTS.

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

Plaintiff's PT Exhibits:

No. 1 - Copy of note dated July 2, 1959 signed by Berky's Drive-In,Inc.

No. 2 - Copy of note dated January 7, 1960, signed by Berky's Drive-In, Inc.

No. 3 - Copy of note dated January 7, 1960, payable to Helen Berkowich signed by David Engel

No. 4 - Photostat of cancelled check in the amount of $2,000, drawn by American Savings & Loan Ass'n payable to Helen Berkowich and endorsed by her and deposited by Berky's Drive-In.

And other documents initialled by both counsel prior to trial.

The originals of said documents will be substituted at the time of trial, if available.

Counsel for Plaintiff agrees to furnish counsel for Defendants with copies of Plaintiffs' PT Exhibits within two weeks.

Counsel for Defendants agrees to furnish counsel for Plaintiff within two weeks copies of any documents upon which he will rely in support of his allegation in the counterclaim as to a commitment for a loan to David Engel and/or Berky's Drive-In, Inc.

Counsel agree to exchange within two weeks the names and addresses of all witnesses known to them, including expert witnesses but exclusive of impeachment witnesses (filing a copy of said list with the Clerk of the Court), and if they learn of any additional witnesses prior to trial, they will exchange the names and addresses promptly.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

Trial Attorneys: For Plaintiffs — Sidney A. Cohen
For Defendants — Harvey A. Jacobs

Assistant Pre-trial Examiner

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[Filed October 29, 1964]

**STIPULATION**

It is hereby stipulated by and between the parties to the above entitled case that said case shall be settled as follows:

(1) The defendant, David Engel, shall pay to the plaintiff, Helen Berkowich, the full sum of Fourteen Thousand, Five Hundred and No/100 Dollars ($14,500.00).

(2) Said sum of Fourteen Thousand, Five Hundred and No/100 Dollars ($14,500.00) shall be payable in all events at the rate of not less than One Hundred Twenty and No/100 Dollars ($120.00) per month, commencing on the 1st day of August , 1966, provided however, that in the event an existing outstanding indebtedness of the defendant, David Engel, to the National Savings and Trust Company is paid or discharged before the 1st day of August , 1966, then and in such event, but not later than thirty (30) days after the liquidation of said indebtedness, the monthly payments as described above shall commence, but in no event shall said payments commence later than the 1st day of August , 1966.

(3) Any balance remaining at the expiration of the existing lease on premises 1236 South Capitol Street, Washington, D.C., shall thereupon be fully due and payable.

(4) The defendants, David Engel and Esther Engel, are the principal stockholders of a District of Columbia Corporation known as Berky's Carry Out Foods, Inc. and the defendant, David Engel, expressly agrees that the increase in the monthly payments to the plaintiff, as hereinbefore provided, shall be determined by the annual gross volume of said company, Berky's Carry Out Foods, Inc., as follows: In the event that the annual gross volume of said business exceeds Seventy Nine Thousand and No/100 Dollars ($79,000.00), then in such event, the said defendant, David Engel, shall increase

his monthly payments hereinbefore provided to the plaintiff at the rate of Ten ($10.00) Dollars per month for each Five Thousand and No/100 Dollars ($5,000.00) increase in volume or portion thereof. In connection therewith, said defendants, David Engel and Esther Engel, or said corporation, Berky's Carry Out Foods, Inc., will cause to be delivered to the plaintiff or her counsel, annual financial statements showing the gross volume of business done by said company for each preceding year, and it is further expressly understood and agreed that the plaintiff or her counsel may be permitted to inspect the books and records of said company, annually, by an accountant to be selected by the plaintiff or her counsel at the expense of the plaintiff.

(5) The defendant, David Engel, represents that he is the holder and owner of forty per cent (40%) of the outstanding capital stock of Berky's Carry Out Foods, Inc. and that the certificate or certificates evidencing said shares of stock shall be endorsed in blank and deposited with the Union Trust Company in escrow, together with a collateral note to be executed by said defendant, David Engel, payable to the plaintiff in the amount of Fourteen Thousand, Five Hundred and No/100 Dollars ($14,500.00), as security for the payment of the indebtedness herein provided, it being expressly understood and agreed that in the event the said defendant, David Engel, defaults for fifteen (15) days in the payment of any one or more of the installments to be paid hereunder, then in such event, the Union Trust Company, as escrow agent, shall, upon the demand of the plaintiff or her counsel, deliver said shares of stock to the plaintiff or her nominee; whereupon the plaintiff may deal with said shares of stock as owner thereof.

(6) There is presently in existence, a lease covering premises 1236 South Capitol Street, Washington, D.C., executed by the plaintiff herein as Landlord and by the defendants, David Engel and

Esther Engel, as Tenants, which lease said defendant have heretofore assigned to Berky's Carry Out Foods, Inc.; and, as additional security for the payment of the indebtedness above provided, the defendant, David Engel, hereby and herewith assigns his interest in and to said lease to the plaintiff.

(7) In connection with the security hereinabove provided, namely, the shares of stock of Berky's Carry Out Foods, Inc., and the interest of the defendant, David Engel, in and to the lease covering premises 1236 South Capitol Street, Washington, D.C., the defendants David Engel and Esther Engel and Berky's Carry Out Foods, Inc., agree to execute and deliver such documents as may reasonably be required to carry out the intent and purpose of the terms and conditions herein provided. The parties hereto expressly agree that upon default for fifteen (15) days of any one or more of the monthly payments described above, then in such event and at the sole option of the plaintiff, the entire balance of said indebtedness shall immediately become due and payable to the plaintiff and that this right or privilege shall be in addition to such other rights or remedies which she may have under the terms hereof.

(8) In the event of the sale of the corporation in bulk, the sale of the business in bulk or the sale of its substantial assets in bulk, then in that event, forty per cent (40%) of the consideration received, whether cash, deferred purchase money or consisting of any other thing of value, shall be paid on the aforesaid note in the original sum of Fourteen Thousand, Five Hundred and No/100 Dollars ($14,500.00); provided further that due notice, in writing, of such intention to sell shall be given to the plaintiff not less than thirty (30) days in advance thereof.

(9) Upon the execution of this Stipulation and the delivery of the collateral note and other security herein provided, a praecipe shall be signed in this cause entering the same as settled and dis-

missed with prejudice, both with respect to the Complaint and Counter-Claim; provided however, that this Stipulation and the security provided for and delivered in accordance with the terms hereunder, shall survive this action and shall be binding upon the parties hereto and their heirs, executors, administrators, personal representatives, successors and assigns.

Dated: October 29th, 1964

DAVID ENGEL

ESTHER ENGEL
Individually as defendants and on behalf of Berky's Carry Out Foods, Inc.

HARVEY A. JACOBS
Attorney for Defendants

HELEN BERKOWICH
Plaintiff

MAXWELL A. OSTROW
Attorney for Plaintiff

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[Filed October 29, 1964]

[Praecipe]

The Clerk of said Court will please enter the above cause and counterclaim as settled and dismissed with prejudice as per the stipulation entered herein of even date.

Harvey A. Jacobs
Attorney for Defendants

Maxwell A. Ostrow
Attorney for Plaintiffs

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[Filed November 27, 1964]

## MOTION OF PLAINTIFF TO ENFORCE STIPULATION OR FOR MONEY JUDGMENT

The plaintiff, Helen Berkowich, by her attorneys, respectfully moves the Court to enter an order herein to compel the defendants to comply with the terms of the Stipulation filed herein, or in the alternative to enter judgment against said defendants in the sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars, and for counsel fees. For reasons therefor, plaintiff states to the Court as follows:

(1) That under and by virtue of the terms of the Stipulation filed herein, the defendant, David Engel, agreed to pay the plaintiff the full sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars, payable in certain installments and, as security for the payment of said sum, the defendant, David Engel, was required forthwith to execute and deliver shares of stock owned by him in the Berky's Carry Out Foods, Inc., and a collateral note in the said amount of $14,500.00; and said defendant, through his counsel, has failed and refused to execute and deliver said collateral note and stock certificates to the plaintiff.

(2) That said defendants' failure and refusal to execute and deliver said note and stock was and is not made in good faith; it is contrary to and in violation of the terms and conditions of said Stipulation filed herein; and that his reasons for such failure and refusal are frivolous.

(3) And for such other and further reasons as may be presented at the hearing of this motion.

Respectfully submitted,

Maxwell A. Ostrow
Maurice Friedman

Attorneys for Plaintiff

[Filed November 27, 1964]

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION**

This case was called for trial at 10: A.M. on October 29, 1964. Counsel for the respective parties hereto met with the Court, and thereafter in the late afternoon of the same day entered into a written Stipulation which was filed and made a part of the record in this case.

Under the terms of the Stipulation, the defendant Engel agreed to pay the plaintiff $14,500.00 by certain installments, and he was required to deliver 40% of the outstanding capital stock of Berky's Carry Out Foods, Inc., endorsed in blank, and a collateral note in the sum of $14,500.00, as well as his interest in a lease on certain real estate located in the District. As a consequence thereof and in accordance with the terms of the Stipulation, a praecipe was signed and filed entering the case as settled and dismissed with prejudice. However, the terms of said Stipulation expressly provided that its terms would survive the dismissal of the action.

Promptly thereafter, a collateral note was prepared by plaintiff's counsel and submitted to counsel for the defendants. Several days later, defendants' counsel stated that his client would not execute the collateral note on the ground that provision should be required to abate and credit interest in the event that some or all of the $14,500.00 was prepaid prior to the commencement of the installment payments. Because such provision was not contained in the Stipulation, a conference was held with the Court and, although there was no justification for this position by the defendant, nevertheless plaintiff's counsel yielded and prepared another collateral note which provided for such interest credit. Yet counsel for the defendant still refuses to permit his client to execute said collateral note or to deliver the shares of stock.

It is obvious that defendant through counsel is trifling with the Court and with counsel for the plaintiff; that there is no justification for the position taken by the defendant and his counsel, and the result is that the terms of the Stipulation have not been complied with; plaintiff and her counsel have been put to added expense, time and effort, and it appears that the defendant will continue to refuse to abide by the terms of the Stipulation.

Under these circumstances, it is submitted that the defendant should be required to execute and deliver the collateral note and the certificates of stock endorsed in blank, or in the alternative, the Court should enter a final judgment herein in favor of the plaintiff and against the defendant or defendants, in the full sum of $14,500.00 plus reasonable counsel fees to plaintiff's counsel of record, and that plaintiff may have execution of said judgment.

Respectfully submitted,

Maxwell A. Ostrow

Maurice Friedman
Attorneys for Plaintiff

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[Filed December 1, 1964]

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE STIPULATION OR FOR MONEY JUDGMENT**

The Defendant, DAVID ENGEL, respectfully prays that the Court deny the Motion of the Plaintiff to Enforce Stipulation Or For Money Judgment, and for the grounds therefor, state that prior to Plaintiff's Motion to Enforce Stipulation Or For Money Judgment, Plaintiff's counsel had in his hands an executed Note in accordance with the Stipulation filed in this cause.

The Collateral Note above referred to was executed on November 25, 1964, and forwarded to counsel for the Plaintiff, who refuses to allow his client to accept said Note. This is the second Note that Defendant has executed in an attempt to comply and please counsel for the Plaintiff. Counsel for the Plaintiff is misleading the Court when he states in his Motion that no Collateral Notes were ever signed and that counsel for Defendant or his client has refused to execute said Collateral Note.

Upon acceptance by the Plaintiff of the Collateral Note, said letter of instructions to the Union Trust Company and the Stock Certificate shall be immediately forwarded to the Union Trust Company in compliance as indicated in the Stipulation in this cause.

A copy of the Note is attached hereto and prayed to be read a part hereof.

Respectfully submitted,

Harvey A. Jacobs
Attorney for the Defendant

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COLLATERAL NOTE

Washington, D.C.

$14,500.00 October 30, 1964

Commencing on or before August 1, 1966, after date for value received, I hereby promise to pay to the order of Helen Berkowich, in lawful money of the United States, at the Munsey Branch of the Union Trust Company of the District of Columbia, in the City of Washington, D.C., Fourteen Thousand Five Hundred Dollars ($14,500.00), at a minimum rate of One Hundred and Twenty Dollars ($120.00) each and every month commencing on or before August 1,

1966, all as provided in a certain Stipulation filed in Civil Action No. 2189-61, in the United States District Court for the District of Columbia dated October 29, 1964, having deposited with Union Trust Company, as escrow agent, for the parties hereto, and as collateral security for the payment of this note the following property, viz: Forty Shares (40) of the outstand capital stock of all shares authorized or issued by said company.

The undersigned reserves the right to prepay or accelerate the payment of the full balance or any part of the indebtedness represented by this collateral note at any time; but in the event of such prepayment prior to July 1, 1968, the undersigned shall be entitled to a credit of interest on such prepayment from the date of the prepayment to July 1, 1968, at the rate of six Per Cent (6%) per annum.

In the event of default for more than fifteen (15) days of any one or more monthly installments as provided herein, and as contained in the said Stipulation, the entire balance remaining unpaid shall forthwith become due, with full power and authority to the holder of this note in case of such default to sell, assign and deliver the whole or any part of this collateral and any substitutes therefor, or additions thereto, at any public or private sale at the option of the holder of this note at any time or times thereafter without any advertisement or notice to me and with the right on the part of the holder to become purchaser thereof at such sale or sales free and discharged of any equity of redemption. After deducting all legal and other costs and expenses for collection, sale and delivery, the holder shall apply the residue of the proceeds of such sale or sales to pay this liability, returning the surplus, if any, to me, but if there is a deficiency I shall remain liable for any amount unpaid.

DAVID ENGEL (SEAL)

The above note shall be valid only upon the said Helen Berkowich signing below and agreeing that the payment of the above obligation shall be deemed full payment and release of the Ten Thousand Dollar Note ($10,000.00) dated January 7, 1960, payable by David Engel to the order of Helen Berkowich. Said note being attached herein and made a part thereof, and that in the event of a sale, the aforesaid stock shall be released by the Union Trust Company to the purchaser of the business upon payment to her of Forty Per Cent (40%) of the consideration received as set out in the stipulation, paragraph eight (8), dated October 29, 1964.

HELEN BERKOWICH

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[Filed December 16, 1964]

**FINAL JUDGMENT**

This cause came on to be heard upon plaintiff's motion to enforce Stipulation, or For a Money Judgment, and thereupon, upon consideration thereof, the memorandum in support of and in opposition to said motion, and after oral argument by counsel for the respective parties hereto, it appearing to the satisfaction of the Court: that the above-entitled cause came on for final hearing on the merits of October 29, 1964, and thereupon the parties hereto by their respective counsel, after negotiations for a final disposition of this cause without the necessity of a trial, entered into a certain Stipulation on October 29, 1964, which was signed by the respective parties and their counsel of record herein, and which was entered into in good faith by the plaintiff; that thereafter and in order to implement the terms and provisions of said Stipulation and, in particular, Paragraph 5 thereof the defendant, David Engel, was requested to execute and deliver a collateral note secured by certain shares of stock in the corporation, Berky's Carry Out

Foods, Inc., together with a letter of instructions to the escrow agent therein provided; that said defendant, David Engel, interposed additional conditions and provisions to be made a part of said collateral note, contrary to the specific terms of said Stipulation, and that said defendant failed and refused to implement said Stipulation by the execution and delivery of such collateral note and instructions to the escrow agent, despite the repeated demands made on behalf of plaintiff; and that, therefore, said defendant was and is in default under the terms and provisions of said Stipulation, as a result whereof the plaintiff is entitled to a money judgment for the amount provided in Paragraph 1 of said Stipulation; it is by the Court this 16th day of December, 1964,

ORDERED, as follows:

(1) That the plaintiff's motion be and the same is hereby granted; and

(2) That the plaintiff, Helen Berkowich, be and she is hereby awarded a final judgment against the defendant, David Engel, in the full sum of Fourteen thousand five hundred ($14,500.00) dollars, and the additional sum of three hundred fifty dollars as and for her counsel fees herein for services required since October 30, 1964, in connection with the implementation of the Stipulation entered herein on October 29, 1964; and that said plaintiff may have execution thereon as at law.

EDWARD A. TAMM
Judge

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HEARING ON MOTION
December 15, 1964

ARGUMENT IN SUPPORT OF MOTION

MR. FRIEDMAN: May it please the Court, we are here representing the plaintiff and seek to get compliance with the terms of the stipulation which was entered into by the parties and their counsel before Judge McLaughlin on October 30th. We appeared there for the trial of the case on that morning and with the encouragement and approval of the Court, we went into negotiations which lasted all day and which finally culminated in the stipulation which was filed. I assume that Your Honor has read that stipulation.

THE COURT: Did the defendant sign and deliver the note for $14,500 to the plaintiff?

MR. FRIEDMAN: No, sir, the defendant did not. Within a day or two thereafter, we prepared a usual standard collateral note form with a letter to be signed by Mr. Engel, the defendant, to the bank directing them to hold the shares of stock, et cetera. And he immediately imposed provisions which were not contemplated nor mentioned in the terms of the stipulation.

The first thing Mr. Jacobs said was, when I called him, that he had mislaid the file and had not seen the [4] collateral note which I sent him. While I waited, he got it out of some file and he said immediately his client would not sign it because there was provision for abatement of interest in the event that there was prepayment of the note. Well, the stipulation didn't provide for any such abatement of interest; it provides clearly and succinctly for the debt of $14,500 to be paid.

So we had to appear before Judge McLaughlin and he agreed with us but he said at that time in the absence of any action, I can't compel him to do this at this time. You may take whatever form of motion you may require. We worked that out and finally agreed to it rather

than to go on any longer.

We sent him another collateral note. At this time, he raised two additional questions: one was that the assignment of the interest in the lease owned by Mr. Engel would be released in the event of a sale of the business, and that this 40 per cent of stock in this corporation would be, which is a family owned corporation by the defendants Engel, would be returned upon our receiving 40 per cent of the consideration paid in the event of a sale of the business.

Well, neither of those provisions were in the stipulation, Your Honor. Here it is a month and a half later, virtually, and we still haven't got that collateral note [5] signed and I suggest to the Court -- I don't like to accuse counsel -- if counsel is not procrastinating in this case, he is allowing his client to utilize the Court for purposes of his own and we feel that he has not complied with this stipulation in good faith.

THE COURT: What are you asking the Court, specifically, to do?

MR. FRIEDMAN: I would ask the Court to direct the signing of this collateral note in the form which we had previously sent to Mr. Jacobs and a simple letter instructing the bank to hold this stock as collateral in accordance with the terms of the stipulation.

If they refuse -- and I suggest that Your Honor compel this to be done within the next 24 or 48 hours -- we ask the Court to enter a judgment for that $14,500 and allow us to have execution.

ARGUMENT IN OPPOSITION TO MOTION

MR. JACOBS: If the Court pleases, I am Harvey Jacobs and I represent the defendant in this case.

I think counsel for the plaintiff is being a little bit unfair. I did send a note signed -- not one but two collateral notes signed to him, which he has in his possession and had them prior to his filing the motion that is before Your Honor this morning.

[6] THE COURT: What were the notes? Why is there any dispute if you sent him the notes that were agreed to by the stipulation?

MR. JACOBS: There are three basic contentions, Your Honor, of disagreement. Number one, this was a suit on a $10,000 note, whether it was due and payable in ten years or whether it was due and payable on demand.

After long deliberations with four attorneys present on the day of trial, finally a stipulation was worked out. The settlement was for $14,500 representing $10,000 for the payment of the principal of the note and $4,500 in agreed interest. In the stipulation, it was spelled out as $14,500 rather than $10,000 with $4,500 interest but there was no question but there was a serious dispute as to how much interest was due, whether it was $6,000 if it was a ten-year note or whether it would be $4,500 which was the agreed price we had all agreed on.

The note that was originally sent had the stock to be placed in escrow with the plaintiff herself. This was not in the stipulation. The stipulation clearly held and states that it is to be put into the Union Trust Company, not the plaintiff.

Number two, since this whole suit was on the [7] original $10,000 note which is still in possession of the plaintiff, it seems only fair that either this note be cancelled or that some provision must be put into the $14,500 agreed settlement note so that that note can be attached to it and that she will accept payment of $14,500 in place of the $10,000 note which she has. There is nothing stopping her from negotiating that $10,000 note. It is a negotiable instrument and this bothers my client no end. Of course, there has been a lot of hard feelings over the years because of this litigation.

Number three, the stipulation states that we have a right to sell the business provided we give the plaintiff the entire 40 per cent interest that our client has, which we have agreed to under the stipulation, but some instruction to the bank must be made in order that the stock will be released from the bank upon payment to the plaintiff of

the full consideration that he receives in the event of a sale.

Those are the three small matters, really, that are in conflict that we can't seem to resolve between counsel. We have given them two notes. The first note we gave them, they didn't agree to and they suggested we leave out the part about the lease because they still wanted the security of the lease after payment of the 40 per cent consideration in case of a sale. We agreed to do this.

[8] We retyped the note, sent it back signed properly and were confronted at that point with this motion. I think under the circumstances that we have complied with the stipulation and I respectfully ask Your Honor to deny the motion.

REBUTTAL ARGUMENT IN SUPPORT OF MOTION

MR. FRIEDMAN: Just one brief observation, Your Honor.

I have here the two forms of notes which Mr. Jacobs sent to us, containing addendum thereto to be signed by the defendant which are not provided for, as we view it, in the stipulation.

If Your Honor would like to see them, I have got them here.

THE COURT: No. Why are the notes not in accord with the stipulation?

MR. FRIEDMAN: Well, because in the first note he sent us, he made a provision that in the event of a sale, the stock placed in collateral would be released and, secondly, that the lease referred to in the stipulation would be released to the purchaser. Neither one of those provisions appear in the stipulation.

The second note and the last one sent by Mr. Jacobs contains a provision that in the event of a sale, the stock [9] shall be released by the Union Trust Company to the purchaser of the business upon payment to her, meaning Mrs. Berkowich, the plaintiff, 40 per cent of the consideration received.

There is no provision for the return of that collateral stock in the event of such a sale in the stipulation. Indeed, it was purposely omit-

ted because we wanted the security to continue, because conceivably he might repay some small part or none of this $14,500 and go through the form of a sale, giving up 40 per cent of whatever that may be and we would thereby lose the collateral of the stock. The stipulation makes no such provision, Your Honor.

THE COURT: Anything more?

FURTHER ARGUMENT IN OPPOSITION TO MOTION

MR. JACOBS: I would just like to comment on that last provision, Your Honor.

The stipulation clearly holds that we have a right to sell. The plaintiff knew we had a right to sell the stock in the corporation. How can we sell the stock in the corporation if there is no provision for the release of it in the event of a sale? We want to give everything to the plaintiff that is due her, but it is just unfair to have her be able to hold up a sale by refusing to release the stock.

ORAL RULING OF THE COURT

THE COURT: The Court will grant the plaintiff's [10] motion for money judgment in the amount of $14,500.

MR. FRIEDMAN: Will Your Honor allow counsel fees?

THE COURT: There is nothing in the motion about counsel fees.

MR. FRIEDMAN: I think I included that, Your Honor. I am not certain. May I have your indulgence for just a moment to look?

THE COURT: Is there anything in the stipulation about counsel fees?

MR. FRIEDMAN: No, sir, there is not, Your Honor.

(Short pause in proceedings.)

MR. FRIEDMAN: The motion does not contain a request for counsel fees, Your Honor.

May I present an order in the morning, Your Honor?

THE COURT: You may.

(Whereupon, the hearing on motion was concluded.)

[Filed December 23, 1964]

## MOTION FOR REHEARING AND RECONSIDERATION OF JUDGMENT ENTERED

The defendant, DAVID ENGEL, by and through his attorneys, JACOBS & SCHLOSBERG, moves this Honorable Court for an Order granting a rehearing and reversal of Judgment entered on December 15, 1964, and for an Order enforcing said Stipulation filed in this Cause, on the following grounds:

1. That the Court erred in entering a money judgment and allowing execution thereon instead of enforcing the terms of the Stipulation.

2. The Court erred in not examining the notes of the plaintiff and defendant to determine whether or not they were, in fact, in accord with the Stipulation, but instead relying solely upon the argument of counsel for plaintiff.

3. That the sole issue before the Court to be decided was whether the notes submitted by the plaintiff complied with the form and spirit of the Stipulation, and that this issue was never decided.

4. That the Court failed to exercise its proper discretion by not considering and ruling on the prevailing equities of defendant's contentions in light of the Stipulation and the defendant's compliance thereto.

5. The Court erred in not making findings of fact and conclusions of law.

6. The Court erred in granting judgment to plaintiff when plaintiff's note submitted did not comply with the Stipulation.

It is respectfully submitted that the defendant, David Engel, in good faith executed a note in favor of the plaintiff in full accord and compliance with the terms of the Stipulation entered in this cause. The note submitted and insisted on by the plaintiff did not comply with the terms of the Stipulation. Said notes are attached hereto and made a part hereof. Plaintiff's counsel insist that the stock should be held in escrow by the plaintiff, Helen Berkowitz. The Stipulation clearly sets out that the stock should be held by the Union Trust Company. The de-

fendant has heretofore maintained that where the Stipulation was entered into to resolve litigation on a pre-existing note and where he has agreed to a new collateral note, that such pre-existing note should be merged into the new note or in the alternative returned to the defendant and that such provides an integral part of the consideration for the Stipulation. Further Defendant has maintained that where the Plaintiff has given Defendant power to sell shares of stock, if the consideration therefore is paid over to the Plaintiff, that it is implicit therein that Plaintiff will permit the stock certificates to go to the purchaser upon receipt of the consideration therefor.

Notwithstanding, however, his understanding of the Stipulation, the defendant submits that he has been and is now ready to sign any note that this Court decrees to be in full compliance with the terms of the Stipulation.

And for such other grounds that may be presented at the time of hearing on this Motion.

RESPECTFULLY SUBMITTED,
HARVEY A. JACOBS,
Attorney for the Defendant

[Certificate of Service]

POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR REHEARING
AND REVERSAL OF JUDGMENT ENTERED

Laughlin, et al v. Berens - 73 App. D. C. 136
McKenzie v. Boorhen, et al - 117 F. Supp. 433
Ingalls Iron Works Company v. Ingalls - 177 F. Supp. 151
Beirne v. Fitch Sanitarium - 167 F. Supp. 652
Rule 59e F. R. C. P.

## AFFIDAVIT OF DAVID ENGEL IN SUPPORT OF MOTION FOR REHEARING AND RECONSIDERATION OF JUDGMENT ENTERED

COMES NOW, the Defendant, DAVID ENGEL, and makes the following Affidavit unto this Honorable Court.

The affiant says:

1. That in good faith executed a note in favor of Plaintiff in full accord and compliance with the terms of the Stipulation entered in this cause.

2. That, notwithstanding his understanding of the Stipulation, the Defendant submits that he has been and is now ready to sign any note that this court lawfully decrees to be in full compliance with the terms of the Stipulation.

DAVID ENGEL

[Notarial Seal dated Dec. 23, 1964]

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## COLLATERAL NOTE

$14,500.00 Washington, D. C. Oct. 30, 1964

Commencing on or before August 1, 1966, after date for value received, I hereby promise to pay to the order of HELEN BERKOWICH, in lawful money of the United States, at the Munsey Branch of the Union Trust Company of the District of Columbia, in the City of Washington, D. C., Fourteen Thousand Five Hundred ($14,500.00) Dollars, at a minimum rate of One Hundred and Twenty ($120.00) Dollars each and every month commencing on or before August 1, 1966, all as provided in a certain Stipulation filed in Civil Action No. 2189-61 in the United States District Court for the District of Columbia dated October 29, 1964, having deposited with Helen Berkowich as collateral security for the payment of this note the following property, viz: For-

ty (40) shares of the stock of Berky's Carry-out Foods, Inc., being 40% of the outstanding capital stock of all shares authorized or issued by said company.

The undersigned reserves the right to prepay or accelerate the payment of the full balance or any part of the indebtedness represented by this collateral note at any time; but in the event of such prepayment prior to July 1, 1968, the undersigned shall be entitled to a credit of interest on such prepayment from the date of the prepayment to July 1, 1968, at the rate of six (6%) percent per annum.

In the event of default for more than fifteen (15) days of any one or more monthly installments as provided herein, and as contained in the said Stipulation, the entire balance remaining unpaid shall forthwith become due, with full power and authority to the holder of this note in case of such default to sell, assign and deliver the whole or any part of this collateral and any substitutes therefor, or additions thereto, at any public or private sale at the option of the holder of this note at any time or times thereafter without any advertisement or notice to me and with the right on the part of the holder to become purchaser thereof at such sale or sales free and discharged of any equity of redemption. After deducting all legal and other costs and expenses for collection, sale and delivery, the holder shall apply the residue of the proceeds of such sale or sales to pay this liability returning the surplus, if any, to me, but if there is a deficiency I shall remain liable for any amount unpaid.

The payment of this note shall be deemed full payment of the Ten Thousand Dollar ($10,000.000) Note dated January 7, 1960, payable by David Engel to the order of Helen Berkowich attached hereto.

DAVID ENGEL (SEAL)

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# COLLATERAL NOTE

$14,500.00 Washington, D. C. October 30, 1964

Commencing on or before August 1, 1966, after date for value received, I hereby promise to pay to the order of Helen Berkowich, in lawful money of the United States, at the Munsey Branch of the Union Trust Company of the District of Columbia, in the City of Washington, D. C., Fourteen Thousand Five Hundred Dollars ($14,500.00), at a minimum rate of One Hundred and Twenty Dollars ($120.00) each and every month commencing on or before August 1, 1966, all as provided in a certain Stipulation filed in Civil Action No. 2189-61, in the United States District Court for the District of Columbia dated October 29, 1964, having deposited with Union Trust Company, as escrow agent, for the parties hereto, and as collateral security for the payment of this note the following property, viz: Forty Shares (40) of the outstand capital stock of all shares authorized or issued by said company.

The undersigned reserves the right to prepay or accelerate the payment of the full balance or any part of the indebtedness represented by this collateral note at any time; but in the event of such prepayment prior to July 1, 1968, the undersigned shall be entitled to a credit of interest on such prepayment from the date of the prepayment to July 1, 1968, at the rate of six Per Cent (6%) per annum.

In the event of default for more than fifteen (15) days of any one or more monthly installments as provided herein, and as contained in the said Stipulation, the entire balance remaining unpaid shall forthwith become due, with full power and authority to the holder of this note in case of such default to sell, assign and deliver the whole or any part of this collateral and any substitutes therefor, or additions thereto, at any public or private sale at the option of the holder of this note at any time or times thereafter without any advertisement or notice to me and with the right on the part of the holder to become purchaser thereof at such sale or sales free and discharged of any equity

of redemption. After deducting all legal and other costs and expenses for collection, sale and delivery, the holder shall apply the residue of the proceeds of such sale or sales to pay this liability, returning the surplus, if any, to me, but if there is a deficiency I shall remain liable for any amount unpaid.

DAVID ENGEL (SEAL)

The above note shall be valid only upon the said Helen Berkowich signing below and agreeing that the payment of the above obligation shall be deemed full payment and release of the Ten Thousand Dollar Note ($10,000.00) dated January 7, 1960, payable by David Engel to the order of Helen Berkowich. Said note being attached hereto and made a part hereof, and that in the event of a sale, the aforesaid stock shall be released by the Union Trust Company to the purchaser of the business upon payment to her of Forty Per Cent (40%) of the consideration received as set out in the stipulation, paragraph eight (8), dated October 29, 1964.

HELEN BERKOWICH

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[Filed January 2, 1965]

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR REHEARING, ETC.**

The authorities cited in support of plaintiff's motion stand for a principle, with which we are in agreement, that a stipulation entered into between litigants in a pending action carries with it the approval of the Court, that the parties are bound by its terms, and that a stipulation should be honored by the parties and enforced by the Courts. Stipulations for settlement fairly arrived at should be encouraged to put an end to litigation, and not to form a basis for further controversy between the parties.

What the defendant seeks here is Court sanction for his wilfull failure and refusal to implement the terms of the Stipulation entered

into by plaintiff in good faith. Indeed, the defendant seeks the aid of the Court in avoiding and evading the plain terms of the stipulation.

The parties and their counsel spent the best part of a day under the aegis of the trial Court in working out the terms of what was thought to be a final disposition of this litigation in the form of a Stipulation; the litigation was dismissed with prejudice; by its terms the Stipulation survived the original action, and the defendant was required forthwith to implement the Stipulation by executing and delivering a collateral note and the shares of stock in a corporation endorsed in blank. After the lapse of several days, we were informed by defendant's counsel that the defendant would not execute the form of collateral note which we had submitted. While the form of this collateral note was rather a standardized instrument, the defendant refused to execute it until some additional provision was made for a discount in the event of pre-payment of the entire note prior to July 1, 1968. While this condition was not a part of the Stipulation (with which the trial judge agreed), nevertheless and in order to expedite the proceeding, the note was modified in that respect. Not content with this, however, the defendant through counsel, insisted upon yet other provisions, namely, the release of the collateral stock upon the sale of the company's business, and the release of the defendant's interest in a lease described in the Stipulation.

Being convinced that the defendant was employing dilatory tactics and obstructing the final disposition of this matter, plaintiff through counsel filed a motion to compel compliance with the Stipulation, or in the alternative, to grant a judgment for the amount of $14,500, the precise amount which the Stipulation solemnly declares that defendant owes to the plaintiff. Thereupon, the defendant filed his opposition in an attempt to justify or rationalize his conduct. It was not until after the motion was argued and the Court had announced its decision, that the defendant then belatedly and in a half-hearted manner offered to sign any note which the Court might decide to be in full compliance with the terms of the Stipulation. Plaintiff's motion offers nothing

new and it is simply an attempted restatement of his previous position.

Defendant by his motion suggests that somehow the Court committed error by not enforcing the terms of the Stipulation which he himself has violated. The order and judgment of this Court precisely enforces the terms of that Stipulation.

Contrary to the defendant's statement, this Court did examine the notes of the plaintiff and defendant, and rejected the note offered by the defendant as being contrary to the terms of the Stipulation; and this Court did conclude that the note submitted by the plaintiff not only complied with the letter and spirit of the Stipulation, but that the defendant violated that Stipulation by refusing to execute the collateral note.

Under these circumstances, it is difficult to understand how the defendant continues to claim that he is entitled to certain "prevailing equities". The findings of the Court made as a part of the final judgment clearly demonstrate that the judgment is not only proper, but also necessary in order to do complete justice in this cause.

It is respectfully submitted that the plaintiff's motion should be denied.

Respectfully submitted,
Maxwell A. Ostrow
Maurice Friedman
Attorneys for Plaintiff

[Certificate of Service]

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[Filed January 5, 1965]

**ORDER**

Upon consideration of the motion of defendant David Engel for rehearing and reconsideration of judgment entered filed herein December 23, 1964, it is this 5th day of January, 1965,

ORDERED that the said motion be, and the same hereby is denied.

HARRY M. HULL, Clerk
by Herbert N. Haller
Deputy Clerk

EDWARD A. TAMM
Presiding Judge

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[Filed January 24, 1965]

**NOTICE OF APPEAL**

Notice is hereby given this 24th day of January, 1965, that David Engel hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of December, 1964 in favor of Helen Berkowich against said David Engel.

HARRY A. JACOBS
Attorney for Defendant

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BRIEF FOR APPELLEES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,208

DAVID ENGEL,

*Appellant*

v.

HELEN BERKOWICH, et al,

*Appellees*

*Appeal From the United States District Court for the District of Columbia*



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*Attorneys for Appellees*

## QUESTION PRESENTED

In the opinion of appellee, the question is:

Where parties to a civil action arrive at a stipulation by the terms of which a settlement of the litigation and controversy is concluded, and which requires defendant to pay plaintiff a stipulated sum by certain installments, and the defendant fails and refuses to comply with collateral provisions designed to secure such payment to the plaintiff, does the lower court have authority to enter a final judgment for the stipulated sum where the court is satisfied that the defendant has defaulted under the stipulation, or is the court powerless to enforce the stipulation under such circumstances.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,208

DAVID ENGEL,

*Appellant*

v.

HELEN BERKOWICH, et al,

*Appellees*

*Appeal From the United States District Court for the District of Columbia*

## BRIEF FOR APPELLEES

### COUNTERSTATEMENT OF THE CASE

This case originated several years ago when on behalf of plaintiff appellee, Mrs. Berkowich, and her husband, since deceased, an action was commenced in the lower court to recover some $40,000.00 advanced or loaned in 1959 and 1960 to the appellant, and for other relief, in connection with a business venture entered into between appellant Engel, his wife and son, and the late Mr. Berkowich. Mrs. Berkowich sought recovery on her own behalf of $10,000 for money loaned appellant by

her. Plaintiffs charged Engel with obtaining these funds by fraud and misrepresentation, and sought punitive damages as well. While the action was pending, Mr. Berkowich died and Mrs. Berkowich remained as plaintiff in her individual capacity and as executrix of the estate of her late husband. (JA 1-5)

The case was finally reached for trial on October 29, 1964, and after spending virtually the entire day on settlement negotiations with the encouragement of District Judge McLaughlin, the parties finally agreed upon the terms of a stipulation settling appellee's claims, and dismissing the counterclaim of Engel.

By its terms, the stipulation provided:

(1) That plaintiff, David Engel, shall pay appellee, Helen Berkowich, the full amount of Fourteen thousand five hundred ($14,500.00) dollars.

(2) This amount at all events must be paid at the rate of not less than $120.00 per month commencing August 1, 1966, or sooner if another debt of Engel would be liquidated sooner.

(3) The balance, if any, would be due and payable at the expiration of an existing lease on premises described below.

(4) As principal stockholders of a restaurant business (Berky's Carry-out Foods, Inc.), the Engels agreed that the installments would be increased based upon the gross volume of business done by that company, and the appellee was given the right to inspect the books and records of the company.

(5) Appellant was required to endorse in blank and to pledge as collateral the shares (40%) of stock owned by him in that company on premises rented from appellee by the Engels; the stock was to have been endorsed in blank and deposited in escrow with the Union Trust Company, together with the collateral note to be executed by appellant in the amount of Fourteen thousand five hundred ($14,500.00) dollars to secure the pay ment of that indebtedness; and in case payment is defaulted the escrow

agent upon demand of appellee or her counsel would deliver the shares to the plaintiff or her nominee to be dealt with as her own.

(6) As additional security, appellant Engel assigned his interest in the lease on the building in which the restaurant was being operated, and which was owned by appellee and her late husband.

(7) In connection with the security of the shares of stock and appellants' interest in the lease, Mr. and Mrs. Engel and the corporation agreed to execute and deliver any further documents to be required to carry out the intent and purpose of the Stipulation; and that upon default of the payments, the entire indebtedness was to become due and payable to appellee, ". . . in addition to such other rights or remedies which she may have under the terms hereof."

(8) In the event of a sale of the business or the company, at least 40% of the total consideration received was required to be paid over to appellee on account of the indebtedness; and appellee was to have been accorded at least thirty (30) days notice in advance of any such sale.

(9) Upon execution of the Stipulation and delivery of the collateral security, a praecipe was to be delivered entering the case as settled and dismissed with prejudice as to both the complaint and counterclaim, but it was provided, however, that the Stipulation, and the security provided for and delivered thereunder shall survive the action and be binding upon the parties and their heirs, executors, administrators, representatives and assigns. (JA 12)

As a result of the failure of the appellant to implement the terms and conditions of the Stipulation of October 29, 1964, by executing and delivering a collateral note as required, appellee was compelled to file a motion to enforce the Stipulation, or in the alternative, for a money judgment. The first paragraph of that motion and the last paragraph of the memorandum in support thereof, requested the court to allow coun-

sel fees to appellee. (JA 13, 15) Appellant's Note 4 in his Statement of the Case erroneously asserts that " . . . the Plaintiffs' motion requested none." (The transcript (JA 24) is either in error, or counsel's statement was misunderstood or in error.)

Appellant filed his opposition to the motion, attached thereto a copy of the form of a collateral note which the appellant insisted was required by the Stipulation, and the motion was orally argued before Judge Tamm who had before him the memoranda of respective counsel, together with a copy of the form of collateral note which each side submitted as being in compliance with the Stipulation. The lower court granted appellee's motion and entered a final judgment which contained the findings with regard to the appellant's default under the terms of the Stipulation, his attempt to impose additional conditions and provisions contrary to the Stipulation, and that despite repeated demands, he had failed and refused to execute and deliver the documents required by that Stipulation, as a result of which plaintiff was awarded a final judgment in the amount of Fourteen thousand five hundred ($14,500.00) dollars admittedly owed by the appellant, together with a fee of $350 to counsel for appellee.

On December 23, 1964, appellant filed his motion for rehearing and reconsideration, and attached thereto a copy of the form of collateral note which appellee had prepared, and the form of a collateral note which the appellant had prepared, which contained for the first time appellant's backhanded proffer to sign any note which the lower court decreed would be in full compliance with the Stipulation (JA 26). Appellee filed her opposition thereto and thereafter on January 5, 1965, the lower court denied appellant's motion. Appellant's Notice of Appeal was filed on January 27, 1965, which appellee submits was untimely filed (see Motion to Dismiss, *supra*).

## SUMMARY OF ARGUMENT

### I

A stipulation entered into between the parties, by the terms of which a final settlement was concluded under the aegis of the trial court, should be enforced by the court when the defendant refuses to comply with certain provisions thereof, and attempts to modify and substantially vary the conditions of the stipulation. The lower court was entirely justified in adopting the findings relating to the defendant's default and in entering a final judgment for the amount due plaintiff appellee in order to carry out the full intent and purpose of the settlement stipulation.

### II

The stipulation in which the defendant appellant obligated himself to pay appellee $14,500.00 did not expressly include interest. However, under these circumstances, interest is justified. Payment of the settlement figure by installments is implicitly conditioned upon performance by appellant of all the terms of the stipulation; he may not unilaterally vary these provisions and still claim the benefits thereof. Appellant cannot default under the terms of the stipulation on the one hand, and on the other seek relief from the court permitting him to pay the settlement by installments.

## ARGUMENT

### I

### There Was Substantial Support for the Findings Below as to Appellant's Non-compliance With the Stipulation

In the first paragraph of the stipulation, appellant agreed to pay the appellee the sum of $14,500.00. Although he was given a period of time within which to pay, it was conditioned upon the performance by appellant of all the terms and provisions of the stipulation which were designed to protect and secure the payment of that amount to appellee. But, once the stipulation had been executed and filed, and the praecipe of dismissal was entered, appellant insisted that the collateral note should contain terms substantially modifying the provisions of the stipulation. He first demanded that the collateral note should contain a provision allowing him a discount upon prepayment or acceleration of the balance due if paid prior to July 1, 1968. Had this been all, the appellee was prepared to accept this material modification in order to bring this matter to a final conclusion. In fact, such a provision was incorporated in the form of the collateral note as redrafted. But appellant was not content and insisted that the stock pledged as collateral would be released upon the payment of 40% of the consideration involved in a sale of the Berky's restaurant. This obviously was contrary to the terms of the stipulation and would place appellee at a great disadvantage in attempting to collect the balance of the note which might be due her at that time. Consequently, a motion was filed on behalf of appellee, either to compel appellant to comply with the terms of the stipulation in respect to the collateral note or, in the alternative, to grant appellee a final judgment for the $14,500.00 which appellant had agreed to pay in the stipulation. Appellee also requested an allowance of counsel fees occasioned by appellant's conduct in this connection.

While the form of the collateral note as prepared by counsel for appellee contains the statement "...having deposited with Helen Berkowich as collateral security . . . .", it was not intended that this provision be literally construed so as to require the delivery of the collateral security to her. In fact, counsel for appellee had prepared and submitted to appellant's counsel a draft of a letter to be signed by appellant giving appropriate instructions to the bank with regard to the stock to be held in escrow. That draft was enclosed in a letter from appellee's counsel dated November 20, 1964; and, as appellant's counsel know, appellee had agreed to substitute in the collateral note the name of Union Trust Company as escrow agent for that of appellee.

At the hearing before Judge Tamm, appellant persisted in his refusal to sign the collateral note prepared by counsel for appellee, and continued his attempt to impose more advantageous terms and conditions than he was permitted under the settlement stipulation. The lower court had before it the entire record, the stipulation, the forms of the collateral note which each side had prepared, and arguments of respective counsel. After full consideration was given to all of these factors, Judge Tamm found: That the stipulation of October 29, 1964, was entered into in good faith by the appellee; that in order to implement that stipulation, particularly paragraph 5 thereof, appellant was requested to execute and deliver a collateral note secured by stock in the Berky's corporation, together with a letter of instructions to the bank escrow agent; that appellant sought to impose additional conditions as a part of the collateral note which were contrary to the terms of the stipulation; that appellant had failed and refused to implement that stipulation despite repeated demands; and that he was in default under the terms and provisions of that stipulation, as a result of which appellee was entitled to a final judgment, together with counsel fees; all of which relief was well within the purview of the Court's equity jurisdiction under the circumstances involved in this case. When the form of the final judgment was submitted to the lower court for signature, counsel for appellant re-ar-

gued the motion before the judgment was signed. Later, on appellant's motion for reconsideration attached to which were copies of the proposed collateral note forms, the lower court again had the entire record before it and concluded that the motion should be denied.

Implicit in the final judgment entered by Judge Tamm is the conclusion that appellant was not acting in good faith, but was trifling with the court. An examination of the stipulation, the motions and memoranda, clearly disclose that the judgment of the lower court was eminently proper and was required in order to accomplish the intent and purpose of the settlement stipulation.

Actually, in resisting the appellee's motion, the appellant in a real sense was attempting to escape from certain explicit obligations under the stipulation to appellee's great disadvantage and at her expense, and he can make no showing that he would suffer any injustice under the order of the lower court.

> "The order on appeal also refused to vacate the settlement agreement of January 6, 1950 . . . To obtain relief from a stipulation the moving party must show that unless relieved he will suffer a substantial injustice and that the other parties to the stipulation can be restored to the same position they would have had if no agreement had been made. We see no substantial injustice to the defendant in leaving the settlement stipulation in effect ...." (*Greenspahn v. Joseph E. Seagram & Sons*, 186 F.2d 616, 620.)

## II

### The Judgment Was Within the Power of the Lower Court and Was Required by the Circumstances

Appellant takes the position, that because the stipulation made provision for installment payments, the final judgment was in excess of the stipulation.

In the first place, the stipulation with regard to the indebtedness of $14,500.00 was not intended to include or exclude interest. And, under such circumstances, it was eminently fair and equitable that the court should have explicitly so provided. (*Krapp Forge Co. v. Employers' Liability Assur. Corp.*, 159 F.2d 536, 539.)

The stipulation was designed and intended to bring about a final settlement of this controversy which has been in existence for several years. The appellant agreed to pay the appellee $14,500.00. The conditions of the stipulation were designed to secure to appellee the payment of the full amount of this settlement insofar as it was practicable to do so. These provisions, albeit hurriedly prepared, were not drafted to provide appellant with a built-in escape hatch; on the contrary, they were prepared so as to provide maximum protection to the appellee and to insure the payment to her of that amount in full. After all, a promise of the payment of $14,500.00 was little enough by way of settlement to exchange for the appellee's claims which totalled approximately $45,000.00. The appellant attempts to evade his responsibilities under the stipulation, while seeking to enlist the aid of the court in attempting to substantially modify those provisions so as to place the appellee in a less advantageous position for the collection of the sum which appellant promised to pay.

The stipulation was intended to and did in fact contemplate a full and final settlement of all of the appellee's claims totaling approximately $45,000.00, of which the personal indebtedness of the appellant to appel-

lee in the amount of $10,000.00 was only a part. This loan of $10,000.00 had been in existence since January 1960, and interest had accrued for several years, and while there had never been any real question about this obligation, by the same token, however, the other claims of the appellee were of a substantial nature and, of course, played a part in reaching what was thought to have been a final settlement of all issues involved. Moreover, the history and background of this controversy impels one to the conclusion that appellant does not come into the court with clean hands, and in effect he is seeking to obtain relief from the court for his own default under the stipulation.

## CONCLUSION

It is time that this controversy was ended, and it is respectfully submitted that the appeal should either be dismissed, or the judgment of the lower court affirmed. In either event, it is respectfully requested that counsel fees be awarded to appellee's counsel herein for the services rendered in connection with this appeal.

Respectfully submitted,

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